

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

Ellen S. McDonnell

Chapter 7

Debtor(s).

Bky Case No.: 03-47244

NOTICE OF HEARING ON MOTION TO DISMISS CHAPTER 7 CASE

TO: The Debtor, all creditors and other parties in interest:

The United States Trustee has filed a motion to dismiss the above-captioned case for substantial abuse under 11 U.S.C. §707(b).

The Court will hold a hearing on this motion, before the Honorable Nancy C. Dreher, U.S. Bankruptcy Judge, at 11:00 a.m. on February 18, 2004, in Courtroom No.7 West, at the United States Bankruptcy Court, United States Courthouse, at 300 South Fourth Street, in Minneapolis, Minnesota.

Any response to this motion must be filed and delivered not later than February 12, 2004, which is three days before the time set for the hearing (excluding intermediate Saturdays, Sundays and legal holidays), or filed and served by mail not later than February 6, 2004, which is seven days before the time set for the hearing (excluding intermediate Saturdays, Sundays and legal holidays). Local Bankruptcy Rule 9006-1.

Dated: _____

CLERK OF BANKRUPTCY COURT

By: _____
Deputy Clerk

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

Ellen S. McDonnell

Chapter 7

Debtor(s).

Bky Case No.: 03-47244

NOTICE OF HEARING AND MOTION TO DISMISS UNDER 11 U.S.C. § 707(b)

TO: The debtor(s) and other entities specified in Local Rule 9013-3.

1. The United States Trustee, by his undersigned attorney, moves the Court for the relief requested below and gives notice of hearing.

2. The Court will hold a hearing on this motion before the Honorable Nancy C. Dreher, U.S. Bankruptcy Judge, at 11:00 a.m. on February 18, 2004, in Courtroom No.7 West, at the United States Bankruptcy Court, United States Courthouse, at 300 South Fourth Street, in Minneapolis, Minnesota.

3. Any response to this motion must be filed and delivered not later than February 12, 2004, which is three days before the time set for the hearing (excluding intermediate Saturdays, Sundays and legal holidays), or filed and served by mail not later than February 6, 2004, which is seven days before the time set for the hearing (excluding intermediate Saturdays, Sundays and legal holidays). **UNLESS A RESPONSE OPPOSING THE MOTION IS TIMELY FILED, THE COURT MAY GRANT THE MOTION WITHOUT A HEARING.**

4. This Court has jurisdiction over this motion pursuant to 28 U.S.C. Sections 157 and 1334, FED.R.BANKR.P. 5005 and Local Rule 1070-1. The United States Trustee has standing to file this motion pursuant to 28 U.S.C. Section 586(a) and 11 U.S.C. Section 307. This

proceeding is a core proceeding. The petition commencing this Chapter 7 case was filed on October 15, 2003. The case is now pending in this Court.

5. This motion arises under 11 U. S. C. Section 707(b) and FED.R.BANKR.P. 1017, 2002 and 4004. This motion is filed under FED.R.BANKR.P. 9014 and Local Rules 9013-1 to 9013-5. Movant requests that this case be dismissed.

6. From the lists, schedules and statements filed by the debtor, it appears that she has the ability to pay a substantial portion of her dischargeable debt without hardship.

7. The debtor lists the following debts:

- (a) On Schedule D, Creditors Holding Secured Claims, the debtor lists one claim totaling \$3,493.48 to Ford Motor Credit Co., secured by a 1999 Ford Escort ZX2. The debtor plans to reaffirm this debt.
- (b) On Schedule E, Creditors Holding Unsecured Priority Claims, the debtor lists one claim totaling \$100.00 to the MN Dept of Revenue.
- (c) On Schedule F, Creditors Holding Unsecured Nonpriority Claims, the debtor lists nine claims totaling \$ 44,977.44.
- (d) The debts listed in the debtor's Schedule of Liabilities appear to be primarily consumer debt. These debts are comprised of credit incurred to purchase consumer items. *See* Debtor's Schedule F

8. On Schedule I, Current Income of Individual Debtor(s), the debtor lists a Monthly Gross Income of \$3,583.34, less deductions for Payroll Taxes and Social Security of \$882.81, Insurance of \$67.00, and Medical Flex contributions of \$100.00, for a Monthly Net Income of \$2,533.53. The debtor also has a deduction of \$107.50 for a retirement contribution, however, unless the debtor can provide documentation that this contribution is mandatory it should not be

allowed. In addition, the debtor has part time income as a dance instructor of \$125.00 per month for a total monthly net income of \$2,658.53.

9. On Schedule J, Current Expenditures of Individual Debtor(s), the debtor lists Total Monthly Expenses of \$2,260.28. Several of these expenses are excessive and should be reduced by the following. Telephone/Cell Phone in the amount of \$195.00 should be reduced by \$120.00 since the debtor should be able to find adequate cell phone and telephone service for \$75.00 a month. Clothing in the amount of \$100.00 should be reduced by \$50.00. Recreation in the amount of \$100.00 should be reduced by \$50.00. Household Supplies and Personal Hygiene in the amount of \$150.00 should be reduced by \$75.00. Total Reductions to claimed expenses \$295.00. Total Claimed Monthly Expenses of \$2,260.28 minus the reductions of \$295.00, equals Adjusted Monthly Expense of \$1,965.28.

10. Total Monthly Net Income of \$2,658.53, minus the Adjusted Monthly Expenses of \$1,965.28, provides the debtor with a monthly disposable income of \$693.25. Over a 36 month Chapter 13 plan the debtor would have \$24,957.00 with which to repay creditors. This would pay 100% of her Unsecured Priority Claim of \$100.00 and 55% of her Unsecured Non-priority claims of \$44,977.44. The debtor would also have an additional \$7,159.00 to pay the Chapter 13 trustee after the payoff of her secured claim of \$3,493.48 for the 1999 Ford Escort, bringing the repayment percentage up to 71%.

11. The debtor is currently employed, and there does not appear to be any likelihood that her employment will be terminated at any time in the future.

12. The debtor has the ability to repay a substantial portion of her general unsecured debt and there appears to be no reason for her unwillingness to do so.

13. The United States Trustee may call Gregory P. Biedermann, Senior Bankruptcy

Analyst, Office of U.S. Trustee, 1015 United States Courthouse, 300 South Fourth Street,
Minneapolis, Minnesota, as a witness regarding the above facts.

WHEREFORE, the United States Trustee respectfully requests that this chapter 7 case be
dismissed.

Dated: January 9, 2004

Respectfully submitted,

HABBO G. FOKKENA
United States Trustee
Region 12

By: /s/ Michael R. Fadlovich
Michael R. Fadlovich
Trial Attorney
United States Trustee's Office
1015 United States Courthouse
300 South Fourth Street
Minneapolis, MN 55415
MN ATTY No. 158410
(612) 664-5505
(612) 664-5516

VERIFICATION

I, Michael R. Fadlovich, attorney for the United States Trustee, the movant named in the foregoing motion, declare under penalty of perjury that the foregoing is true and correct according to the best of my knowledge, information and belief.

Executed on: January 9, 2004

Signed: /s/ Michael R. Fadlovich
Michael R. Fadlovich
Trial Attorney

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

Ellen S. McDonnell

Chapter 7

Debtor(s).

Bky Case No.: 03-47244

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

This memorandum is submitted pursuant to Local Rule 9013-2(a). It appears that dismissal of this Chapter 7 case is appropriate under 11 U.S.C. 707(b).

Analysis

A Motion to Dismiss for Substantial Abuse is governed by Section 707(b) of the Bankruptcy Code, which provides:

After notice and a hearing, the court, on its own motion or on a motion by the United States trustee but not at the request or suggestion of any party in interest, may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts if it finds that the granting of relief would be a substantial abuse of the provisions of this chapter. There shall be a presumption in favor of granting the relief requested by the debtor.

11 U.S.C. § 707(b)(1994). The United States Trustee bears the burden of showing substantial abuse. *In re Dubberke*, 119 B.R. 677, 679 (Bankr. S.D. Iowa 1990).

(1) The Debtor's Debts Are Primarily Consumer Debts.

Section 101(8) of the Bankruptcy Code defines "consumer debts" as "debt incurred by an individual primarily for a personal, family, or household purpose." 11 U.S.C. § 101(8) (1994). "Debt" is defined as a "liability on a claim." 11 U.S.C. § 101(12) (1994). "Claim" is defined as a "right to payment, whether or not such right is reduced to judgment, liquidated, fixed, contingent,

matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." 11 U.S.C. § 101(5)(A) (1994).

The purpose of the debt generally determines whether a debt is a consumer debt. *Zolg v. Kelly* (*In re Kelly*), 841 F.2d 908, 913 (9th Cir. 1988); *In re Palmer*, 117 B.R. 443, 446 (Bankr. N.D. Iowa 1990). If the credit transaction does not involve a business transaction or a profit motive, it is usually regarded as a consumer debt. *Palmer*, 117 B.R. at 446 (citing *In re Booth*, 858 F.2d 1051, 1054-55 (5th Cir. 1988)); *In re Berndt*, 127 B.R. 222, 223 (Bankr. D.N.D. 1991) (citing *Kelly* and *Booth*, but distinguishing *Booth* by concluding that private investment debts, not used to further an ongoing business, were consumer debts).

In the present case, it appears that the debtor's debts are 100% consumer debts.

(2) The Granting of Relief under Chapter 7 Constitutes Substantial Abuse of Chapter Seven of the Bankruptcy Code.

To satisfy the "substantial abuse" standard under Section 707(b), the Eighth Circuit has ruled that the primary consideration is whether the debtor has the ability to fund a 13 plan. *In re Walton*, 866 F.2d 981, 984 (8th Cir. 1989) (following *In re Kelly*, 841 F.2d 908, 914-15 (9th Cir. 1988); *United States Trustee v. Harris*, 960 F.2d 74, 76 (8th Cir. 1992); *Fonder v. United States*, 974 F.2d 996, 999 (8th Cir. 1992); *Huckfeldt v. Huckfeldt* (*In re Huckfeldt*), 39 F.3d 829, 831 (8th Cir. 1994) (comparing § 707(b) to § 707(a)).

Whether the debtor is eligible to file a petition under Chapter 13 after a Section 707(b) dismissal is also not relevant factor, and likewise, the debtor cannot be forced to file a Chapter 13 petition after a 707(b) dismissal order is entered if the debtor is qualified for Chapter 13 relief. *Fonder*, 974 F.2d at 999. "The essential inquiry remains whether the debtor's ability to repay creditors with future income is sufficient to make the Chapter 7 liquidating bankruptcy a substantial

abuse of the Code." *Id.*

In addition, the Eighth Circuit holds that a bankruptcy court may reject the credibility of amended schedules when the amendments are offered after a Section 707(b) motion is filed and the amended schedules seek to decrease income and/or increase expenses because the debtor swore as to the accuracy of the initial schedules. *Fonder*, 974 F.2d at 1000.

Recently, in *In re Mathes*, the bankruptcy court held that the ability to repay 35% of the debtor's debt to unsecured creditors was a substantial abuse of the Bankruptcy Code. BKY 96-32602, slip op. at 8-9 (Bankr. D. Minn. August 21, 1996). The court took into consideration that the debtor would not suffer undue hardship by complying with a Chapter 13 plan, that the unsecured debt of the debtor was primarily credit card debt that was not incurred as the result of an emergency or other unforeseen contingency, that the conduct of the debtors by amending his schedules to increase his expenses after the Section 707(b) motion was filed was not credible. *Id.*, slip op. at 408.

On appeal, the District Court of Minnesota affirmed the Bankruptcy Court's decision. *Mathes v. Stuart (In re Mathes)*, Civil File No. 3-96-906, slip op. (D. Minn. July 2, 1997) The District Court held that the finding of substantial abuse with a 35% threshold was appropriate:

In this Circuit, there is no clear cut formula or quantitative, threshold percentage of debt that must be repaid under a Chapter 13 plan in order to constitute grounds for dismissal for "substantial abuse." See Walton; Fonder; see also In re Schmidt, 200 B.R. 36, 38 (Bankr. D. Neb. 1996).... Rather, (and until such a threshold is articulated), Bankruptcy Courts are to use their best judgment to determine what repayment percentage is appropriate on a case-by-case basis. Considering the record before it, the Bankruptcy Court concluded, without comment, that a 35% repayment plan over a three year term was sufficient to constitute "substantial abuse." After conducting a de novo review of the record, this Court agrees. An ability to contribute more than \$17,000 towards \$ 44,000 of unsecured debt is "substantial."

Id., slip op. at 6-7.

In the present case, the debtor has the ability to repay a substantial portion of her general unsecured creditors in thirty six months. Her ability to fund a Chapter 13 plan is grounds to dismiss this case for substantial abuse under Section 707(b).

WHEREFORE, the United States Trustee submits this memorandum in support of his motion to dismiss the above-captioned case as a substantial abuse of the Bankruptcy Code.

Dated: January 9, 2004

Respectfully submitted,

HABBO G. FOKKENA
United States Trustee
Region 12

By: /s/ Michael R. Fadlovich
Michael R. Fadlovich
Trial Attorney
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**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

Ellen S. McDonnell,

Chapter 7

Debtor(s).

BK 03-47244 NCD

CERTIFICATE OF MAILING

I, Emily Rohr, certify under penalty of perjury that I am an employee in the Office of the United States Trustee for the District of Minnesota and am a person of such age and discretion as to be competent to serve papers.

That on January 9, 2004, I served a copy of the Proposed Notice of Hearing, Motion to Dismiss Under 11 U.S.C. §707(b), Memorandum of Law in Support of Motion to Dismiss; and proposed Order in the above-referenced case by placing said copy in a postpaid envelope addressed to the person(s) hereinafter named, at the place and address stated below, which is the last known address, and by depositing said envelope and contents in the United States Mail at Minneapolis, Minnesota.

Addressee(s):

Gregory J. Wald
3601 Minnesota Drive, Suite 800
Edina, MN 55435

John R. Stuebner
2500 One Financial Plaza
120 South Sixth Street
Minneapolis, MN 55402

Ellen S. McDonnell
10504 Lyndale Avenue South
Bloomington, MN 55420



**Office of the United States Trustee
Emily Rohr**

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

Ellen S. McDonnell

Chapter 7

Debtor(s).

Bky Case No.: 03-47244

ORDER

At Minneapolis, Minnesota, the _____ day of _____, 2004.

This matter came before the Court for hearing on the Motion of the United States Trustee's Office for an Order dismissing this Chapter 7 case pursuant to 11 U.S.C. §707(b). Appearances were noted in the record.

The Court made its findings of fact and conclusions of law on the record pursuant to Rule 52 of the Federal Rules of Civil Procedure and Bankruptcy Rule 7052.

IT IS HEREBY ORDERED:

That this Chapter 7 bankruptcy case is dismissed as a substantial abuse pursuant to 11 U.S.C. Section 707(b).

The Honorable Nancy C. Dreher
United States Bankruptcy Judge